

Appeal from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management, rejecting proposed modification of approved mining plan of operations and requiring reclamation of area of unauthorized mining operations. NV-056-82-09P.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Plan of Operations -- Wilderness Act

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

APPEARANCES: L. C. Artman, L. W. Colman, R. E. Ditto, pro sese.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

L. C. Artman, L. W. Colman, and R. E. Ditto have appealed from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management (BLM), dated October 23, 1985, rejecting appellants' proposed modification of their approved mining plan of operations, NV-056-82-09P, and requiring reclamation of the area affected by appellants' unauthorized mining operations.

Appellants are the owners of four mining claims, known as the Hacienda Nos. 1 through 4 lode mining claims (N MC 233568, N MC 234137, N MC 235023, and N MC 235022) situated in sec. 21, T. 26 S., R. 61 E., Mt. Diablo Meridian, Clark County, Nevada, within the South McCullough Range Wilderness Study Area (WSA) (NV-050-435). On June 23, 1982, appellants submitted a proposed plan of operations with respect to their mining claims, in which they proposed the "exploration of existing tunnel for core samples only." Appellants also

stated: "No surface disturbances will be conducted or any structures or facilities will be constructed. \* \*  
 \* There will be no additional disturbed area resulting from the proposed operation."

By letter dated September 21, 1982, the Area Manager advised appellants that their proposed plan of operations had been approved, subject to an additional stipulation that the access route to the claims be reclaimed to the satisfaction of the BLM authorized officer and that appellants notify BLM of the completion of operations and submit a reclamation plan "for the authorized officer's approval."

On September 28, 1984, appellants submitted a proposed modification of their approved plan of operations, which would principally involve surface mining of a 300-by-300 foot area extending out from the mouth of the existing tunnel and installation of a mill. Appellants proposed to use a dozer/ripper, a loader and drilling equipment in their operations. Appellants stated that "[v]ery little blasting" was anticipated, mine tailings would be placed in a "small wash," and the area would be reclaimed upon the completion of operations. Appellants also proposed to place a 24-foot trailer on the site, to build a helicopter pad with a 75-foot radius and to upgrade the existing trail to the site in order to accommodate 4-wheel-drive vehicles.

By letter dated October 26, 1984, the Area Manager acknowledged receipt of appellants' proposed modification and stated that an October 24, 1984, field examination of the site of appellants' operations had "revealed activities not in compliance with the original plan of operations." <sup>1/</sup> This is confirmed in a January 25, 1985, report to the Area Manager in which the District hydrologist stated that a January 23, 1985, field examination had discovered "the planned access road was already bladed, the mill site cleared, and found evidence of blasting." <sup>2/</sup> In addition, the record contains a summary of BLM's assessment of appellants' proposed modification, including a chronology of related BLM activity, which states that a July 6, 1984, overflight of the claims "reveal[ed] mining activity in excess of that authorized in plan." In particular, the summary states that, following approval of the initial plan of operations, "some road blading occurred and a trench 40' long, 15' wide and 10' deep was dug into the side of the hill creating a large \* \* \* surface [disturbance]."

In a January 22, 1985, memorandum to the Area Manager, the District Outdoor Recreation Planner recommended that appellants' proposed modification be rejected because appellants would be unable "to develop and rehabilitate the

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<sup>1/</sup> The record contains an "Incident Record" which indicates that two BLM employees, including a BLM wilderness specialist, entered the WSA on Oct. 24, 1984. In addition, the record indicates that these employees examined appellants' mining claims. However, the BLM report does not refer to any unauthorized activities within appellants' claims. That is confirmed elsewhere in the record. See infra.  
<sup>2/</sup> The District hydrologist recommended against approval of appellants' proposed modification until a rehabilitation plan had been approved and noted that the proposed modification was "not explicit enough to analyze impacts to watershed values."

site to the point where it is substantially unnoticeable" prior to the deadline for compliance with the "nonimpairment criteria." He further explained:

Waste from the mine area will be approximately 3,000 cubic yards for each foot of excavation. A ten foot pit would result in more than 30,000 cubic yards of waste to be disposed of in the small wash the operator has identified. The waste will expand 10 to 20 percent in volume when placed in the wash area. I do not think that the wash can hold the entire amount of waste material that can be anticipated from this project without significant visual impacts and major rehabilitation efforts. 3/

In his October 1985 decision, the Area Manager, pursuant to 43 CFR 3802.1-5(b)(3), rejected appellants' proposed modification of their approved plan of operations and prohibited continuation of such proposed operations, noting that the "anticipated and existing impacts" of appellants' proposed operations "will impair the suitability of the area for preservation as wilderness." In addition, the Area Manager, pursuant to 43 CFR 3802.1-5(e), required appellants to undertake one of two alternative courses of action to reclaim "all areas affected by your unauthorized mining operations as defined in 43 CFR 3802.0-5(a)." The Area Manager required appellants to either submit a modified plan of operations describing proposed reclamation measures within 30 days of receipt of the decision and, "upon approval of the Authorized Officer, complete these measures no later than February 15, 1986" or "remove equipment from, recontour, and reestablish natural vegetation \* \* \* to the satisfaction of the Authorized Officer no later than February 15, 1986." Finally, the Area Manager stated that, if appellants hadn't completed all reclamation by February 15, 1986, BLM would "complete reclamation measures \* \* \* and recover from you all costs incurred." Appellants have appealed from the Area Manager's October 1985 decision.

In their statement of reasons for appeal, appellants contend that they fully intend to comply with the original plan of operations "still in effect" when they have ceased operations. They also state that they have not abandoned their mining claims, have exposed a valuable mineral deposit and intend to patent the claims.

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3/ The District hydrologist's January 1985 report and the District Outdoor Recreation Planner's January 1985 memorandum are apparently the only written assessment of appellants' proposed modification, although the record indicates that it was reviewed by other BLM resource specialists. This may fall short of the "environmental assessment" required by 43 CFR 3802.3-1(a) for a "significant modification" of an approved plan of operations. Nevertheless, we conclude this circumstance is not a reversible error where the record contains an assessment "whether the proposed activity will impair the suitability of the area for preservation as wilderness." *Id.* See *Dale F. Gimblett*, 60 IBLA 341 (1981). In addition, while the record does not contain any specific information from the BLM wilderness specialist, there is an indication that the recreation planner's memorandum was passed to her and no indication that she disagreed with the assessment.

[1] The first question which we must consider is whether BLM properly rejected appellants' proposed modification of their approved mining plan of operations. The October 1985 BLM decision clearly states that BLM rejected appellant's proposed modification pursuant to 43 CFR 3802.1-5(b)(3) because the "anticipated and existing" impacts of the envisioned operations would "impair the suitability of the area for preservation as wilderness." The record indicates that this conclusion was derived from the District Outdoor Recreation Planner's January 1985 memorandum, which stated that the site of appellant's proposed operations could not be timely returned to a "substantially unnoticeable" condition.

BLM's authority to reject appellants' proposed modification is derived from section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. @ 1782(c) (1982), which governs the management of WSA's during the period of wilderness review. Under section 603(c), BLM is required to manage the land "in a manner so as not to impair the suitability of [the area] for preservation as wilderness." 4/ Doyle Cape, 79 IBLA 204 (1984). The applicable Departmental regulations require BLM to review an original and a modified mining plan of operations under the nonimpairment standard. See 43 CFR 3802.1-5(b) and 3802.1-6(c). After assessing the plan, BLM must either approve the plan subject to measures designed to prevent impairment of the area's suitability for preservation as wilderness or reject the plan where anticipated impacts of mining operations would result in impairment of the area's suitability for preservation as wilderness. 43 CFR 3802.1-5(b)(3).

The crucial question then is whether appellants' proposed mining operations would violate the nonimpairment standard. As defined in the regulations, impairment will be found where proposed operations would result in impacts "that cannot be reclaimed to the point of being substantially unnoticeable [5/] in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System." 43 CFR 3802.0-5(d). This regulation sets forth the "deadline" referred to in the District Outdoor Recreation Planner's January 1985 memorandum. The final time for the Secretary's recommendation is October 21, 1991. 43 U.S.C. @ 1782(a) (1982).

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4/ There is a statutory exception to management under the nonimpairment standard, i.e., for existing mining uses. 43 U.S.C. @ 1782(c) (1982). Such uses may continue in the "manner and degree in which the same was being conducted on October 21, 1976," subject to regulation only to the extent necessary to prevent unnecessary or undue degradation. Id. See State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979). However, the record indicates that appellants' mining operations are not subject to this less strict management standard since no mining activity prior to enactment of FLPMA was shown to exist. John Loskot, 71 IBLA 165 (1983).

5/ "Substantially unnoticeable" is defined in the regulations as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or mancaused because of age, weathering or biological change." 43 CFR 3802.0-5(m).

As observed above, BLM concluded that the site of appellants' proposed mining operations could not be returned to a substantially unnoticeable condition by the requisite deadline. In their proposed modification, appellants vowed to undertake the necessary reclamation, including regrading and reseeding the excavated area, as well as planting, watering, and fertilizing. However, on appeal, appellants do not challenge BLM's conclusion that the area cannot be returned timely to a substantially unnoticeable condition. It is well established that appellants have the burden of overcoming BLM's factual conclusion by a preponderance of the evidence. Norman G. Lavery, 96 IBLA 294, 298-299 (1987). Therefore, in the absence of any evidence to the contrary, we must conclude that BLM properly rejected appellants' proposed modification of their approved mining plan of operations. Doyle Cape, *supra*; Keith R. Kummerfeld, 74 IBLA 106 (1983); Keith R. Kummerfeld, 72 IBLA 1 (1983); Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981), appeal dismissed without prejudice, Havlah Group v. Watt, Civ. No. 82-1018 (D. Idaho Nov. 16, 1982).

The next question presented is whether BLM properly required appellants to cease unauthorized mining operations and to undertake certain reclamation. At the outset, it is important to note the limits of the BLM decision in this respect. BLM is not requiring appellants to cease all mining operations. Indeed, BLM could not completely forbid mining. See Southwest Resource Council, 96 IBLA 105, 120, 94 I.D. 56 (1987). Thus, appellants may continue mining operations approved under their original plan of operations. In addition, appellants are not precluded from submitting another proposed plan of operations for BLM approval, *i.e.*, one which will satisfy the nonimpairment standard. 6/ The October 1985 BLM decision simply requires appellants to cease those operations proposed in the modification submitted in September 1984 and to reclaim the area affected by such unauthorized operations, because they violate the nonimpairment standard.

The applicable Departmental regulations indicate that mining operations on lands under wilderness review fall into three categories, those for which an approved plan of operations is required prior to the initiation of operations, those for which an approved plan may be required, and those for which an approved plan is not required. See 43 CFR 3802.1-1, 3802.1-2, and 3802.1-3. In the present case, the record indicates that appellants undertook operations under their proposed modification for which an approved plan was required. See William E. Godwin, 82 IBLA 105 (1984); Keith R. Kummerfeld, 74 IBLA at 108 n.3. These activities were road blading, digging a 40 by 15 by 10 foot trench, n7 and blasting. See 43 CFR 3802.1-1. Clearly, in view

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6/ Indeed, the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72014, 72023 (Dec. 12, 1979), which governs BLM's management of WSA's, provides that "BLM field officials will assist applicants to find ways, if possible, of achieving their goals by methods that are consistent with the [IMP]." See, *e.g.*, Golden Triangle Exploration Co., 76 IBLA 245 (1983); Keith R. Kummerfeld, 74 IBLA at 107; Keith R. Kummerfeld, 72 IBLA at 2-3.

7/ On appeal, appellants admit that a 10-foot deep "cut" was made. However, they apparently argue that it was required by the general mining laws. The general mining laws require annual assessment work (30 U.S.C. @ 28 (1982)),

of the fact that an approved plan was required prior to the initiation of such activities, BLM was entitled to preclude the continuation of such operations and to require the reclamation of affected areas where BLM concluded that such operations would impair the suitability of the area for preservation as wilderness. 8/ Cf. 43 CFR 3802.4-1. That is consistent with BLM's management obligation under section 603(c) of FLPMA and applicable Departmental regulations. Accordingly, we conclude that BLM properly required appellants to cease those mining operations proposed in appellants' September 1984 proposal and to either submit proposed reclamation measures and complete such measures as approved or remove equipment, recontour and reestablish natural vegetation to BLM's satisfaction with respect to the area affected by such operations. Either course of action was calculated to preclude any impairment of the affected area's suitability for preservation as wilderness. Following appellants' receipt of this decision, they will comply with the reclamation requirements set forth in the October 1985 BLM decision within six months of the date of this decision.

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fn. 7 (continued)

but do not require a specific form of "discovery work." Appellants are apparently referring to what was once a State, rather than a Federal, requirement. However, we note that as of at least 1983 Nevada does not require discovery work in terms of some form of excavation. See 2 American Law of Mining @ 33.05[1] (2nd ed. 1984).

8/ The regulations provide an exception to the prohibition on operations prior to approval of a plan of operations in situations where such approval is required. That is, where BLM fails to notify the operator of "action" on his plan within 30 days of receipt thereof, or an extension not to exceed 60 days, "operations under the plan may begin." 43 CFR 3802.1-5(e). In the present case, the record indicates that BLM did not take any action within 30 days of receipt of appellants' proposed modification, in accordance with 43 CFR 3802.1-5(a), but requested, by letter dated Oct. 31, 1984, an extension of time to Nov. 15, 1984 to review appellants' proposed modification, in accordance with 43 CFR 3802.1-5(d)(3). However, subsequently, BLM did not notify appellants of any action on their proposed modification until the Oct. 23, 1985, decision. Nevertheless, we are not aware of any mining operations which took place after Nov. 15, 1984. Indeed, the Oct. 1985 BLM decision reiterates that an Oct. 24, 1984 field examination had "revealed that [appellants'] existing operation was not in compliance with [their] approved Plan." Even if there were operations after Nov. 15, 1984, this would not preclude BLM from ensuring that such operations satisfy the nonimpairment standard. Department regulation 43 CFR 3802.1-5(e) also provides that, even in such circumstances, "if the authorized officer at a later date finds that operations under the plan are impairing wilderness suitability, the authorized officer shall notify the operator that the operations are not in compliance with these regulations and what changes are needed." "[C]hanges" may include reclamation necessary to bring the operations into compliance with the nonimpairment standard.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge.

Anita Vogt  
Administrative Judge  
Alternate Member.

